UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CY-FAIR VOLUNTEER FIRE DEPARTMENT	Cases	16-CA-107721
		16-CA-120055
and		16-CA-120910
ROBERT BERLETH		
and		
CRAIG ARMSTRONG		

CHARGING PARTY BERLETH'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTY BERLETH'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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COMES NOW, Charging Party Robert Berleth (hereinafter "Berleth"), the undersigned, and files this Reply Brief (hereinafter the "Reply") to the Respondent's Answering Brief to Charging Party Berleth's Exceptions and Brief in Support of Exceptions to the Administrative Law Judges Decision (hereinafter the "Answer"), filed in the above-styled matter by Respondent on January 15, 2016.

A. General Reply to the Answer

Despite having a nearly unlimited legal budget, the song spun by the Respondent has failed to hit a second note. Undisputed evidence proves contrary to the Answer and the ALJ findings; Charging Party Berleth's exceptions should be sustained; and the Board should find that Berleth was discharged for engaging in protected activity. Case in point, Respondent now claims in his Answer that "Berleth began his union activity in response to being suspended [on April 4, 2013]…" when the record clearly shows organization efforts by Berleth as the main organizer occurred as early as 2011 and knowledge by the Respondent of some kind of union activity in February 2013. During this time Berleth arranged a meeting with an out-of-town IAFF representative, began and conducted organizing employee meetings, and discussed the benefits of organizing with other employees. (TR 197).

These events occurred months and years before Respondent discovered Berleth's involvement as the main organizer and began targeting him for termination (TR 140). Yet somehow, Respondent asks the Board to ignore these obvious facts and sing along with a one-note song in order to carry an injustice in favor of Goliath.

B. Unsubstantiated Claims

In Section III, Para. A. of the Answer (page 4-5), Counsel for the Respondent has capitalized on Berleth's lack of experience in arguing before the NLRB, and cites technicalities for the Board to ignore unsubstantiated arguments. In this technical argument, Respondent does not dispute Berleth's several assertions as untrue. Instead, Respondent asks the Board to ignore these facts for technical reasons.

Having to write a *pro se* brief with nothing more than personal trial notes available, the undersigned initially apologized for the lack of exhibit tables in the exceptions brief, and now apologizes for these additional breaches of procedure. He does, however, assert each of them as a true reality, unsubstantiated or not[1].

C. Respondent has Distorted Berleth's Disciplinary History

Respondent Answers the Exceptions with the same song: Disciplinary History. However, an objective review of the record shows that of the ~12 disciplinary write-ups received, six of them occurred several *years* prior to his termination, and each of these six preceded Berleth's hand-selected promotion to FTO status on August 1, 2011 (TR 29: 24-25). ~Four additional write-ups occurred during the March 28, 2013 to May 6, 2013 timeframe, during the exact time that the Respondent absolutely knew Berleth was mounting a union organizing effort and terminated him.

Respondent cites to the record showing disciplinary actions against other employees for lost equipment, yet fails to mention that no other employee has *ever* been terminated for losing

[1] Respondent attempts an unsubstantiated claim of his own on page 9 of his Answer, by claiming that Berleth "faxed the petition for election just prior to [May 20th]" when the evidence at trial both on Respondents' Exhibit (Resp. Exhibit 16) and testimony (TR 272) are exactly opposite. Even well-paid and highly experienced counsel with several editors available are subject to the human condition. Each brief should be equitably and objectively considered by the Board on their merits, not solely focused on a technicality or procedure.

equipment and certainly not on the first instance, including Berleth's equally-responsible Paramedic partner, Omar Dar. Nor has any employee ever been written up for working overtime, violating the workout policy, or being out of district. Multiple employees testified each activity was normal (TR 59, 192, 207, 433:20-21) and supervisors admit they had never written an employee up for these actions before (TR 489-490, 496, 578). Respondent's knowledge that other employees had committed the same actions without discipline, coupled with the evidence of unlawful motivation above, demonstrates Respondent seized upon the opportunity to discharge a known union organizer. See *Sanderson Farms, Inc*., 340 NLRB 402, 402-03 (2003) (Pretextual reason for discharge defeats employer's attempt to show it would have discharged employee absent his union activity).

The two or three remaining incidents that occurred between his FTO promotion and the final shift(s) are as follows:

1) The March 26, 2012 write-up for being late occurred over a year prior to termination, was Berleth's first incident of being late, and was purely due to a scheduling miscommunication. (TR 237, R. Exh. 19).
2) The December 17, 2012 driving incident was appealed, with King Grayson himself denying the appeal *sua sponte*. (TR 88, R. Exh. 23). Union activity was heavy at this point, and Grayson may have suspected Berleth at this time, even without proof.[2]
3) The January 28, 2013 incident is unsigned by Berleth and even the Respondent categorized the incident as "meeting notes"[3] (TR 542, 555). These notes could have been created at any time. The issue was not presented to Berleth as a discipline at the

[2] Other organizing employees were also targeted at this time, but with no substantiating evidence of such in the record, the argument that Grayson was taking shots in the dark against the union will not be put forth.

[3] Martha Hannah, when asked by Respondent's counsel if the document was a disciplinary report on Berleth, answered, "these are meeting notes written on a disciplinary form." (Tr. 542) On cross-examination, she repeated the document represents meeting notes that happen to be written on a disciplinary form. (Tr. 555).

time, which would have given him an opportunity to comment on and/or challenge it. Grayson thereby circumvented Berleth's appellate rights for a second time in as many months, a mere 60 days before the termination. (R. Exh. 26).

Furthermore, the Respondent asks this Board to ignore the fact that during the time frame between August 8, 2011 (FTO promotion) and March 25, 2013, Berleth also received three ***positive*** write-ups for exceptional patient care, and an additional positive incident report on July 23, 2010 for a performance "not seen in 19 years". (GC Exhibit 14) Despite being targeted by Grayson towards the end of the time frame, Berleth received as many positive write-ups as he did negative, a rare thing indeed. These positive write-ups prove that Berleth performed his duties well until at least February, 2013.

Generally, Respondent asks the Board to overlook the fact <u>that ~83% of the purported disciplinary incidents occur either on his final shift or prior to Berleth's FTO promotion</u>, and that two of the remaining three incidents were orchestrated by Chief Grayson directly leading up to the unlawful termination, all while ignoring all positive performance evidence. Properly offsetting the disciplinary actions against the FTO promotion and Grayson's anti-union efforts, the only evidence supporting Respondent's claims of "a long history of performance problems" is the single outlying disciplinary incident on March 26, 2012 for being late. Berleth has a "history of discipline" beyond his FTO promotion because the Respondent created it.

An objective review of the timeline and incidents clearly shows that in early 2013, the Respondent hastily created policy and documented incidents for which no other employee had ever been disciplined, specifically to justify Berleth's termination.

So far, *the strategy has worked.*

D. Respondent was Well-Aware of Berleth's Organizing Prior to May 17th

Respondent's Answer claims that "the ALJ correctly found Respondent was not aware of Berleth's union activity prior to May 17th", which is a patently false statement. Respondent cites the Boards established policy not to overrule an Administrative Law Judge's credibility resolutions unless the clear preponderance of the evidence convinces the Board that they are incorrect. See *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Grayson obviously knew about the union organizing activities occurring by May 14-15, 2013, when he discussed the issues with Martha Hanna, held meetings, and sent emails regarding the issue; Berleth asserts that the Board would be able to conclude with a clear preponderance that the Respondent had knowledge of Berleth's union organizing efforts prior to May 14, 2013, and subsequently targeted and discharged him in violation of the Act.

Respondent furthers misleading arguments on page 13 of the Answer, by claiming that simply because Grayson is himself a member of the IAFF, he cannot harbor an anti-union animus. The record clearly shows Grayson was anti-union (TR 41, 173-174, 184, 301, 303) and the Administrative Law Judge correctly found that Grayson unlawfully threatened employees with discharge for supporting or organizing the union. (ALJ Decision, at p. 18). Grayson's hubris knew a collective bargaining employee's union would threaten his personal fiefdom.

Being a union member for decades, Grayson knew how to manipulate the system, avoid documenting illicit activity, and discharge the main organizer in order to quell the union. Berleth asserts that Grayson's knowledge of union procedures and employee protection against arbitrary discipline is precisely why Grayson was so opposed to the union (and exactly why it was needed). Undoubtedly, Berleth was discharged for engaging in protected activity, which was known to the Respondent well before May 17, 2013, proven by clear and convincing evidence.

E. Respondent had Full Knowledge of Berleth's Participation

The Respondent (Answer, p. 9) argues that on May 20, 2013 when the "decision was made to terminate Berleth, no appeals committee or Board of Directors were aware of any union activity by Berleth", which is not only irrelevant[4], it is also patently false. During Berleth's final termination hearing on May 20, 2013, Jennifer Walls, the Board President who actually presided over the meeting (TR 509:12, 527:5), Kenneth Grayson, and Martha Hanna, each had personal knowledge that not only was a union organization effort underway, but that Berleth by name had been designated as the main organizer on the petition for election. (TR 272, Respondent Exhibit 16). Berleth was under no further obligation to notice the Respondent nor the appeals board members of the pending petition for election during the disciplinary hearing.[5]

Respondent's claim that Berleth "faxed the petition for election just prior to [May 20, 2013]" is impossible— Berleth had not handled the document(s) for over a week at that point. As stated in the original exceptions brief, Berleth had submitted the signature cards and signed the petition for election to legal counsel for the Union prior to May 10, 2013, specifically because he had to travel out of town for a job interview.[6] The notice clearly came from legal counsel's office by the fax header. The delay by legal counsel in faxing and submitting these several documents to the NLRB Region is not the smoking gun that Respondent would ask the Board to believe.

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[4] The Board has routinely found that a supervisor's knowledge is imputed to the employer. *State Plaza Inc.,d/b/a State Plaza Hotel*, 347 NLRB 755, 757 (2006); *Dobbs International Services*, 335 NLRB 972, 973 (2001). Respondent acquired knowledge of Berleth's activity through Littrell-Kercho via her conversation with Eddie Flemmons in Feb. 2013 and via the notice of election, received by Respondent on May 17, 2013.

[5] Berleth did state during the May 20, 2013 hearing that he was "not being terminated for the reasons stated" and that he was being politically targeted, at which point Grayson asked to meet with the board privately in executive session. Soon afterwards, the board emerged from executive session and determined Berleth should be terminated.

[6] Respondent has since "blacklisted" Berleth to all other 911 employers in the area, making it impossible for him to find comparable work as a Paramedic. Berleth has since been forced to change his career path, and began attending law school full time in 2014. Upon graduation, he hopes to continue his military career with the US Army JAG corps.

F. Berleth is Positive to the Reasons for Discharge

On Page 11 of the Answer, Respondent claims "At best, [Berleth] was unsure" if he was wrongfully terminated. Berleth was never unsure about the fact that he was terminated for his union organizing. Berleth was an exceptional Paramedic/FTO, provided excellent patient care during his tenure, and was specifically targeted for engaging in an employee organizing activity. The difficulty lies in getting the Respondent to admit what and when they knew about it and assigning particular disciplinary actions to what knowledge. (TR 97, 472) This task is particularly challenging in the face of current supervisors and assistant chiefs suddenly having massive cases of amnesia about conversations they had which would exactly prove that knowledge. (TR 441, 501:14).

Direct evidence of motive is not required. Discriminatory motive may be inferred from circumstantial evidence and the record as a whole, the timing of the adverse action in relation to the protected activity, statements and actions showing the employer's animus toward the activity, and evidence demonstrating that the employer's proffered explanation for the adverse action is a pretext. *Baptist Med. Ctr./Health Midwest*, 338 NLRB 346, 377 (2002); *Tubular Corp. of America,* 337 NLRB 99 (2001); *Washington Nursing Home*, 321 NLRB 366, 375 (1996); *Best Plumbing Supply*, 310 NLRB143, 144 (1993).

G. Conclusion

Long story short, in an effort to quell a union organization effort the Respondent terminated the main organizer of the union by creating and magnifying disciplinary actions that were otherwise unimportant to his employment. Respondent had enough forethought (or luck) not to document the real reasons for termination, and has thus far gotten away with it through the

use of sophisticated legal counsel and amnesia. Charging Party Berleth now asks this Board to correctly see through the smoke and mirrors to find that he was in fact terminated for his participation in the protected activity.

For the reasons stated above and on the record as a whole, the undersigned respectfully requests the Board find the Administrative Law Judge erred in his conclusion of law and that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Berleth because of his union and protected concerted activity. The Board should find and fashion an appropriate remedy that would require Respondent to post an appropriate Notice to Employees of the unlawful discharge of Berleth and order such other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act.

SIGNED in HOUSTON, TEXAS on this, the 27th day of January, 2016.

Respectfully submitted,

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